2006 BNH 008 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 03-13878-MWV
Chapter 7

Bob Desmond,
Debtor

ASR Acquisition Corp.,
Movant

v.

Bob Desmond,
Respondent

William B. Pribis, Esq.
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Attorney for Movant

William S. Gannon, Esq.
WILLIAM S. GANNON PLLC
Attorney for Respondent

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Attorney for Robert Wolfe Associates, P.C.,
Party in Interest

MEMORANDUM OPINION

The Court has before it the motion of ASR Acquisition Corp. ("ASR") for relief from the automatic stay in the above-captioned case. An objection to the motion was filed by the Debtor, Bob Desmond, and Robert Wolfe Associates, P.C., a party in interest, appeared. Three days of hearings were held at which the Court took testimony from six witnesses, including a representative of ASR, and the Debtor, and the Court received volumes of documentary evidence.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

The relationship between the Debtor and ASR evidently goes back to 1994. However, for purposes of this motion, it starts on December 31, 1996, when ASR acquired certain obligations of the Debtor to the FDIC. According to the "Settlement and Forbearance Agreement" (Ex. 211), the principal, interest and fees owed to the FDIC were not less than $2,832,851.77, which was reduced to the original principal amount of $2,300,000 (Forbearance Agreement) and reflected in a Consolidated, Amended and Restated Promissory Note (the "Consolidated Note") as of December 31, 1996, in the principal amount of $2,300,000. (Ex. 2.) The question of the $300,000 fee will be discussed later.

On about July 27, 1997, ASR acquired obligations owed by the Debtor to Eastern Bank in the principal amount of $2,684,987.05 and interest of $701,232.10. (Ex. 5.) By a letter agreement dated June 27, 1997 (Ex. 4), ASR and the Debtor agreed that the amount due would be reduced to $500,000. This agreement also provided that ASR would be entitled to receive $100,000.

On March 6, 2003, Desmond executed a promissory note in favor of ASR in the principal amount of $250,000, although only $150,000 was advanced by ASR. (Ex. 7.)

In all cases, mortgages on the Orford property known as Strawberry Farm where executed by the Debtor to ASR or assigned to ASR.

Since 1996, expenses and interests have accrued and certain payments have been made on the obligations. ASR has filed a proof of claim in the amount of $2,844,690.50, which represents the sums of $3,173,851.49 due as of the petition date and a payment by a guarantor of $329,160.99 paid after the petition date.

ASR now seeks to obtain relief from the automatic stay to foreclose its mortgages and security interest in the Orford, New Hampshire, property. For purposes of this proceeding, no one has challenged the validity of the mortgage, but instead the amount owed, if anything, to ASR.

On August 26, 2005, the Court converted this case from Chapter 11 to Chapter 7, and a Chapter 7 trustee was appointed.

DISCUSSION

ASR seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (2).[1]

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization[.]

11 U.S.C. § 362(d)(1) and (2) (2004). In the matter of Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26 (1st Cir. 1994), the circuit court held that a "hearing on a motion for relief is meant to be a summary proceeding" in that "such hearings do not involve a full adjudication on the merits of claims, defenses, or counterclaims, but simply a determination as to whether a creditor has a colorable claim to property of the

[1] Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq.*

estate." Grella v. Salem Five Cent Sav. Bank, 42 F.3d at 31-32. While in the instant case the Court allowed more than a summary hearing, the Court reaches its opinion today in the context of the dictates of the Grella decision.

At the outset, as indicated above, this is no longer a reorganization case. Section 362(d)(2) requires that in order to grant relief, the property is not necessary to an effective reorganization. Since there is no reorganization in progress, the Court finds that the property in question is not necessary to an effective reorganization.

The Court will first discuss the value of the Strawberry Farm. At trial, Robert J. McLaughry of McLaughry Associates, Inc., testified as to the value of the property in question. His opinion of value was admitted as ASR's Exhibit 1. Mr. McLaughry testified that he had been in the real estate business for fourteen years and concentrated in sales of properties in the upper valley, on both sides of the Connecticut River, which includes the Town of Orford, New Hampshire, where the property in question is located. His testimony was that he had done thirty to thirty-five market analyses per year with a focus on properties in excess of $500,000. While Mr. McLaughrey was not designated as an appraiser, the Court found him qualified to testify because of his experience in selling properties in the area for a considerable period of time. His testimony was that only one property in Orford sold for over $1,000,000 in the last five years, which he used as a comparable, along with two other properties located in Lyme, New Hampshire. He testified that the properties in Lyme sold for more than properties in Orford, since Lyme is south of Orford and closer to Hanover, New Hampshire. His opinion of value was that the property was worth $1,300,000.

On cross-examination, he admitted that he did not enter the residence and did not walk the entire property.

The Debtor, who testified as to the property value, believed it to be worth $1,600,000 to $1,700,000. In support of this figure, he produced a letter from a Neil Redpath of Coldwell Banker-Redpath & Co. valuing the property at $1,600,000. (Def's. Ex. 125.) Mr. Redpath did not testify.

For purposes of this motion for relief, the Court finds that the value of the property in question is $1,500,000.

As indicated above, the Debtor's strategy was to challenge the amounts owed to the movant. Much time was spent on whether the movant kept two sets of books. The Court believes this to be a red herring. It is true that the movant recorded on its books the FDIC obligation in an amount less than the face amount of the Consolidated Note. This was explained that since the movant was on a cash basis, it had to be booked at the amount actually paid in connection with the FDIC transaction. It had no bearing on the amount owed by the Debtor pursuant to the Consolidated Note in the amount of $2,300,000.

Likewise referring to a letter dated November 1, 2001, the Debtor argues that the agreed amount of the obligation owed by the Debtor of $3,543,809.66 was reduced to $1,562,966.41. It is uncontested that the reduction proposed by the letter was subject to certain conditions precedent. It is also uncontested that these conditions precedent were never met and, thus, the Court finds that there was no reduction in the amounts agreed to be owed as of November 1, 2001. The Debtor argues that he was somehow coerced into signing the letter. The court finds that impossible to believe. The Debtor, the holder of a law degree and a participant in many sophisticated business transactions, cannot convince the Court that he was taken advantage of or coerced by the movant.

The Court will now dissect the components of the movant's proof of claim. Pursuant to the 12/31/96 Consolidated Note, the movant states that it is owed $1,019,824 in principal plus $1,069,959.28 in interest and $500,000 in fees for a total of $2,589,780.28. The Court will first discuss the $500,000 in fees. This is made up of two components: an alleged $300,000 fee pursuant to the 12/31/96 Agreement and $200,000 in connection with the November 1, 2001, letter agreement. Nowhere in the Consolidated

Note (Ex. 1) or the Settlement and Forbearance Agreement (Ex. 211) can the Court find reference to a $300,000 fee. The Note calls for the payment of $2,300,000. There is a provision that no interest will accrue on the "principal amount of $300,000 due hereunder" until there is an event of default. Nothing in the Consolidated Note or Forbearance Agreement (Ex. 211) provides for an obligation to pay $300,000 on top of the $2,300,000. In reviewing movant's Exhibit 11, it appears that interest was charged on the total $2,300,000 from December 31, 1996, to December 31, 1998, at the rate of ten percent. The Consolidated Note said that interest would not be charged on the principal of $300,000 until a default occurred. The Court finds that the Debtor is entitled to a deduction of $60,000 for interest charged from 1996 to 1998. Subsequent to 1998, the Debtor was in default, and interest would accrue pursuant to the terms of the Consolidated Note. The Court further finds that the $300,000 fee is not supported by any documentation and, thus, disallows the $300,000 fee. As to the $200,000 fee referred to in the November 21, 2001, letter, the Court finds that there is insufficient documentation to support the allowance of that fee. The letter refers to the $200,000 being part of the net amount due, but the net amount never became due since the conditions precedent were not met. It further appears from Exhibit 11 that interest was never charged on the fees. Thus, the Court reduces the amount due on the Consolidated Note by $560,000, leaving a balance of $2,029,780.28.

The next obligation in the proof of claim is referred to as the Eastern Bank obligation. The obligation arose out of a purchase by the movant of Debtor's obligations to Eastern Bank, which were assigned to movant in July 1997. It appears from movant's Exhibit 5, the non-recourse assignment, that the obligations at the time of the assignment were in excess of $3,000,000. By a letter agreement executed by counsel for movant and Debtor dated June 27, 1997, these obligations were reduced to $500,000. This letter also provided for an additional fee of $100,000 due the movant. The proof of claim indicates that at the time of the filing, $283,046.80 in principal was due plus $1,336.61 in interest and the $100,000 fee. Unlike the prior obligation, the Court finds the $100,000 fee to be due and owing since it was part of the same transaction that reduced the amounts due to $500,000 to the benefit of the Debtor.

The final obligation is what is referred to as the Weaver Cove note. The proof of claim shows principal due of $150,000 and interest of $349.31 for a total of $150,349.31. The Debtor argues that this is not due and owing since the movant's obligation under the Note was for $250,000 of which $100,000 was not advanced. The Court disagrees. The Debtor clearly received the sum of $150,000, which he is now obligated to pay.

Finally, the Debtor argues that, during the course of the relationship with the movant, exorbitant legal fees were charged and paid and that the proceeds of the sale of other assets held by the Debtor or related guarantors were misapplied. As to the legal fees, while the argument was made, there is no specificity in the record to pinpoint any specific fees. As to the misapplication of payments, it appears from Exhibit 11 that they have all been accounted for and applied to the ultimate benefit of the Debtor. To examine the legal relationship of all of the related entities to the Debtor and the movant is surely outside the scope of the motion for relief as provided for in Grella.

Based on the above, the Court finds that the obligation due the movant for the purposes of this motion for relief is $2,564,512 plus attorneys' fees of $47,327.08 and foreclosure costs of $2,011.41. The Court finds that there is no equity in the property and grants the movant's motion for relief from the automatic stay.

CONCLUSION

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 28th day of February, 2006, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge